IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARMEN J. CARDONA,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 11-3083
	)	
ERIC K. SHINSEKI,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

NOTICE TO THE COURT

Appellee, Eric K. Shinseki, Secretary of Veterans Affairs (Secretary), by his undersigned counsel, hereby notifies the Court and the parties that the Department of Veterans Affairs (VA) will not defend the constitutionality of section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, and section 101(31) of title 38 of the United States Code under the equal protection component of the Fifth Amendment against challenges based on sexual orientation, for the reasons explained in the attached letter to the Court from The Honorable Will A. Gunn, General Counsel of VA, dated May 9, 2012. The reasons cited in General Counsel Gunn's letter are further explained in the letter from the Secretary to The Honorable John A. Boehner, Speaker of the House, dated May 4, 2012, as well as the letters from the Attorney General to Speaker Boehner dated February 23, 2011 and February 17, 2012, each of which is attached hereto. The Secretary has informed Members of Congress of this decision pursuant to 28 U.S.C. § 530D(a)(1)(B)(ii), so that Members of Congress

who wish to participate in litigation regarding the constitutionality of section 3 of DOMA and 38 U.S.C. § 101(31) may pursue that option.

The Secretary's decision to not defend the constitutionality of the statutory provisions at issue is limited to the defense of the provisions against a challenge under the equal protection component of the Fifth Amendment based on sexual orientation. Specifically, as set forth in the attached letters, it is the position of the President and the Attorney General that section 3 of DOMA classifies on the basis of sexual orientation; that heightened scrutiny is the appropriate standard of review for the classification based on sexual orientation in section 3 of DOMA; and that, consistent with that standard, section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law.

The Secretary's decision to not defend the constitutionality of the relevant provisions on the basis outlined above does not implicate the other challenges raised by Appellant in this case. The Secretary reserves his right to respond to any and all such challenges and to advance his position on all matters relevant to this appeal. Accordingly, while the Secretary will not defend the relevant statutory provisions against a challenge under the equal protection component of the Fifth Amendment based on sexual orientation, he remains a party to this case, reserves the right to participate fully in these proceedings, and will continue to represent the interests of VA before this Court.

Dated: May 9, 2012

Respectfully submitted,

WILL A. GUNN
General Counsel

R. RANDALL CAMPBELL
Assistant General Counsel

/s/ Carolyn F. Washington
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DEPARTMENT OF VETERANS AFFAIRS
General Counsel
Washington DC 20420

May 9, 2012 In Reply Refer To:

Gregory O. Block
Clerk of the Court
U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue NW, Suite 900
Washington, D.C. 20004

Re: *Cardona v. Shinseki*, Vet. App. No. 11-3083

Dear Mr. Block:

The above-referenced action involves the constitutionality of section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, as well as the definitional provision in title 38 of the term "spouse," 38 U.S.C. § 101(31).

The President and Attorney General previously have determined that section 3 of DOMA classifies on the basis of sexual orientation; that heightened scrutiny is the appropriate standard of review for the classification based on sexual orientation in section 3 of DOMA; that, consistent with that standard, section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law; and that the Department of Justice would cease its defense of section 3 against challenges under the equal protection component of the Fifth Amendment in such cases. In light of these determinations, the Attorney General instructed his attorneys to cease defending section 3 of DOMA against constitutional challenges brought under the equal protection component of the Fifth Amendment. The Secretary of Veterans Affairs (Secretary) agrees with the determinations made by the President and Attorney General and, as such, the Department of Veterans Affairs (VA) will not defend section 3 of DOMA against challenges based on sexual orientation and brought under the equal protection component of the Fifth Amendment in this case.

The Attorney General has also concluded that 38 U.S.C. § 101(31) similarly classifies on the basis of sexual orientation and that heightened scrutiny is the appropriate standard of scrutiny under which the classification based on sexual orientation in this provision should be reviewed. Consistent with the Attorney General's determination, the Secretary will not defend the title 38 definition of "spouse" as set forth in 38 U.S.C. § 101(31) against a challenge based on sexual orientation and brought under the equal protection component of the Fifth Amendment.

Further, in accordance with the provisions of 28 U.S.C. § 530D and as explained in the attached letter to The Honorable John Boehner dated May 4, 2012, we hereby

"notify the court of our interest in providing Congress a full and fair opportunity to participate in the litigation" in this case. While VA will not defend section 3 of DOMA or the title 38 definition of the term spouse against challenges based on sexual orientation and brought under the equal protection component of the Fifth Amendment, it will remain a party to this case and will continue to represent its interests throughout this litigation.

Respectfully submitted,

Will A. Gunn
General Counsel

Attachment

THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

May 4, 2012

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to 28 U.S.C. § 530D, I write to inform you of steps that the Department of Veterans Affairs (VA) intends to take in *Cardona v. Shinseki*, Vet. App. No. 11-3083, which is currently pending before the United States Court of Appeals for Veterans Claims (Veterans Court). Per 38 U.S.C. § 7263(a), VA is represented by its General Counsel before this Article I court. *Cardona* involves constitutional challenges to section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, which defines the term "marriage" for purposes of Federal statutes, regulations, or rulings to mean only a union between one man and one woman as husband and wife, and defines the term "spouse" to mean only a person of the opposite sex who is a husband or wife. This case also involves constitutional challenges to 38 U.S.C. § 101(31), which defines a "spouse," for the purposes of statutory provisions in title 38 of the United States Code pertaining to VA benefits, as a person of the opposite sex who is a wife or husband.

As you know, on February 23, 2011, the President and the Attorney General of the United States announced their determination that classifications based on sexual orientation warrant a heightened standard of constitutional scrutiny under the equal protection component of the Fifth Amendment and that section 3 of DOMA fails such scrutiny as applied to couples who are legally married under State law and is therefore unconstitutional. Based on this determination, the Attorney General instructed the Department of Justice to cease defense of section 3 of DOMA against equal protection challenges. On February 17, 2012, with regard to a district court case currently pending in Massachusetts, *McLaughlin v. Panetta*, Case No. 11-11905 (D. Mass.), the Attorney General announced his determination that the language of the statutory definitions of "surviving spouse" and "spouse" contained in 38 U.S.C. § 101(3) and (31) is materially identical to the language of section 3 of DOMA and, therefore, that those title 38 provisions cannot withstand heightened scrutiny to the extent they deny persons in legally recognized same-sex marriages the same benefits provided to persons in legally recognized opposite-sex marriages.[1] Accordingly, the Attorney General instructed the Department of Justice to cease defense of those statutory provisions against challenges under the equal protection component of the Fifth Amendment.

[1] In *McLaughlin*, the plaintiffs are challenging the title 38 definitions for both "surviving spouse" and "spouse"; however, the title 38 equal protection challenge in *Cardona* only concerns the definition of "spouse" contained in 38 U.S.C. § 101(31).

The Honorable John A. Boehner

Based on the determinations of the President and the Attorney General with regard to section 3 of DOMA and the determination of the Attorney General with regard to the title 38 definitional provisions, as well as the anticipated position that the Department of Justice would take before the United States Court of Appeals for the Federal Circuit if *Cardona* were appealed to that court, VA's General Counsel and I have decided that VA will not defend section 3 of DOMA and 38 U.S.C. § 101(31) against challenges under the equal protection component of the Fifth Amendment based on sexual orientation before the Veterans Court in *Cardona*. As the Attorney General concluded, there is no justification for the distinction between same-sex and opposite-sex spouses that would warrant treating the challenged provisions of title 38 differently from section 3 of DOMA.

This decision is confined to the defense of those particular provisions against equal protection challenges based on sexual orientation brought by individuals legally married under State law and does not implicate other challenges that have been raised by the appellant in *Cardona*. VA will remain a party to the case and will notify the court of our interest in providing Congress a full and fair opportunity to participate in the litigation. In addition, consistent with VA's obligation to take care that the laws be faithfully executed, VA will continue to apply and enforce section 3 of DOMA and 38 U.S.C. § 101(3) and (31) unless and until Congress repeals those provisions or the judiciary renders a definitive verdict against their constitutionality.

On April 19, 2012, the appellant filed her brief with the Veterans Court. The Veterans Court construed the appellant's brief as a motion to expedite the briefing process pursuant to Rule 47 of the Court's Rules of Practice and Procedure and, on May 2, 2012, granted the motion and ordered that VA file its brief no later than 21 days after the date of the Order. On May 3, 2012, in response to a motion by VA, the Veterans Court issued a subsequent Order allowing VA a total of 45 days to file its brief. Accordingly, VA's brief is now due on June 4, 2012. Rule 15 of the Court's Rules of Practice and Procedure governs intervention by a third party.

Please do not hesitate to contact VA's General Counsel Will Gunn at (202) 461-4995 if you have any questions.

Sincerely,

Eric K. Shinseki

Office of the Attorney General
Washington, D. C. 20530

February 17, 2012

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *McLaughlin v. Panetta*, No. 11-11905 (D. Mass.)

Dear Mr. Speaker:

On February 23, 2011, I notified Congress of the Executive Branch's determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, is unconstitutional as applied to same-sex couples who are legally married under state law, and to inform Congress that I would instruct Department attorneys to cease defense of Section 3 against a challenge under the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D—and after consultation with the Department of Defense and the Department of Veterans Affairs—I write to inform you of steps the Department will take in *McLaughlin v. Panetta*, No. 11-11905 (D. Mass.), a case that presents constitutional challenges, including under the equal protection component of the Fifth Amendment, to Section 3 of DOMA and certain additional statutory provisions.

In *McLaughlin*, plaintiffs are current and former active duty members of the United States military seeking various federal benefits for their same-sex spouses. These benefits include medical and dental benefits, basic housing allowances, travel and transportation allowances, family separation benefits, military identification cards, visitation rights in military hospitals, survivor benefits, and the right to be buried together in military cemeteries. The plaintiffs claim that Section 3 of DOMA prevents their same-sex spouses from being eligible for these benefits. They also claim that certain additional statutory provisions, including two definitional provisions in Title 38, may affect the eligibility of same-sex couples for military and veterans' benefits, even independent of Section 3. The language of the Title 38 provisions is identical in material respects to the language of Section 3 of DOMA: Those provisions, like Section 3, define the term "spouse" (or "surviving spouse") as "a person of the opposite sex." 38 U.S.C. §§ 101(3), (31).

As I explained in my letter of February 23, 2011, the President and I have concluded that classifications based on sexual orientation should be subject to a heightened standard of constitutional scrutiny under equal protection principles, and that Section 3 of DOMA fails such scrutiny as applied to couples who are legally married under state law.

McLaughlin presents a challenge, among other things, to provisions of Title 38 that are the equivalent to Section 3 of DOMA. Like Section 3, the provisions of Title 38 challenged in *McLaughlin* classify on the basis of sexual orientation, by denying veterans' benefits to legally married same-sex married couples for which opposite-sex married couples would be eligible. Also like Section 3, these provisions as applied to legally married same-sex couples cannot survive heightened scrutiny because they are not "substantially related to an important government objective." *Clark v. Jeter,* 486 U.S. 456,461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia,* 518 U.S. 515, 535–36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533. The legislative record of these provisions contains no rationale for providing veterans' benefits to opposite-sex spouses of veterans but not to legally married same-sex spouses of veterans. Neither the Department of Defense nor the Department of Veterans Affairs identified any justifications for that distinction that could warrant treating these provisions differently from Section 3 of DOMA.

I have accordingly determined that 38 U.S.C. § 101(3) and 38 U.S.C. § 101(31), as applied to same-sex couples who are legally married under state law, violate the equal protection component of the Fifth Amendment. My determination is confined to the defense of those particular provisions against challenge under the equal protection component of the Fifth Amendment, and does not implicate the other challenges raised by the plaintiffs in *McLaughlin*. In accordance with my determination, I will instruct Department attorneys not to defend those provisions against the equal protection claims in *McLaughlin* and to inform the district court of the Department's view that, like Section 3 of DOMA, 38 U.S.C. § 101(3) and 38 U.S.C. § 101(31) cannot be constitutionally applied to same-sex couples who are legally married under state law. As they have in cases challenging Section 3, our attorneys will also notify the court of our interest in providing Congress a full and fair opportunity to participate in the litigation. We will remain a party to the case and continue to represent the defendants and the interests of the United States throughout the litigation. As with Section 3 of DOMA, the Executive Branch will continue to enforce 38 U.S.C. § 101(3) and 38 U.S.C. § 101(31), consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals those provisions or the judicial branch renders a definitive verdict against their constitutionality.

On February 15, 2012, the court in *McLaughlin* stayed the case for 60 days. Thus, an answer or other responsive pleading and response to plaintiffs' motion for summary judgment would be due on April 28, 2012. Please do not hesitate to contact us if you have any questions.

Sincerely yours,

Eric H. Holder, Jr.
Attorney General

Office of the Attorney General
Washington, D. C. 20530

February 23, 2011

The Honorable John A. Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7,[1] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch's determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2011, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications

[1] DOMA Section 3 states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.[2]

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Standard of Review

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's "ability to perform or contribute to society." *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have "demean[ed] the[] existence" of gays and lesbians "by making their private sexual conduct a crime." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).[3]

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[2] *See, e.g., Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal.,2005); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bkrtcy. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

[3] While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," and "[t]his strong policy renders racial classifications 'constitutionally suspect.'"); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (observing that "'our Nation has had a long and unfortunate history of sex discrimination'" and pointing out the denial of the right to vote to women until 1920). In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics "beyond the individual's control" and that "very likely reflect outmoded notions of the relative capabilities of" the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) ("Unfavorable opinions about homosexuals 'have ancient roots.'" (quoting *Bowers*, 478 U.S. at 192)).

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see* Richard A. Posner, Sex and Reason 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in *Romer v. Evans,* 517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and "ability to attract the [favorable] attention of the lawmakers." *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don't Ask, Don't Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged "political powerlessness." Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. *See, e.g.*, Statement by the President on the Don't Ask, Don't Tell Repeal Act of 2010 ("It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.")

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003).[4] Others rely on claims regarding "procreational responsibility" that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings.[5] And none

[4] *See Equality Foundation v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

[5] *See, e.g., Lofton* v. *Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the

engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*.[6] But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

Application to Section 3 of DOMA

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States v. Virginia* , 518 U.S. 515, 535-36 (1996). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.[7] *See Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or

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argument that DOMA serves a governmental interest in "responsible procreation and child-rearing." H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

[6] *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

[7] *See, e.g.*, H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality"); *id.* at 16 (same-sex marriage "legitimates a public union, a legal status that most people . . . feel ought to be illegitimate" and "put[s] a stamp of approval . . . on a union that many people . . . think is immoral"); *id.* at 15 ("Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality"); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are "in accord with nature and hence have a moral component"); *id.* at 31 (favorably citing the holding in *Bowers* that an "anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable"); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer* that "[t]his Court has no business . . . pronouncing that 'animosity' toward homosexuality is evil").

fear" are not permissible bases for discriminatory treatment); *see also Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by "the liberties of landlords or employers who have personal or religious objections to homosexuality"); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

Application to Second Circuit Cases

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a "reasonable" one. "[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute "in cases in which it is manifest that the President has concluded that the statute is unconstitutional," as is the case here. Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001).

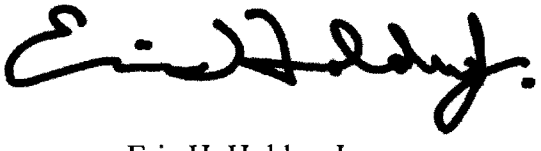
In light of the foregoing, I will instruct the Department's lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch's view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of

DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President's instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the *Windsor* and *Pedersen* cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,



Eric H. Holder, Jr.
Attorney General